

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUL 30 1990

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JERRY LEE MARLEY,
Defendant-Appellant.)

No. 89-2192
(D.C. Crim. No. 89-072 JB 01)
(D. New Mexico)

ORDER AND JUDGMENT*

Before LOGAN, BALDOCK and BRORBY, Circuit Judges.

Defendant Jerry Lee Marley pleaded guilty to possession with intent to distribute less than fifty kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D), reserving his right to appeal the denial of his motion to suppress evidence. After being sentenced defendant brought this appeal, raising two issues: (1) whether the stop by a United States border patrol officer, which ultimately led to the discovery of marijuana in the trunk of defendant's car, was justified under Terry v. Ohio, 392 U.S. 1 (1968), and the cases that have elaborated on its ruling; and (2) whether the district court erred in failing to give

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

defendant a two-level reduction pursuant to United States Sentencing Commission, Guidelines Manual § 3B1.2 (Nov. 1989) because he was a minor participant.

The officer who stopped defendant's vehicle was a United States border patrol officer stationed at the established checkpoint on Interstate 25 at Truth or Consequences, New Mexico. Defendant's vehicle was stopped at approximately 5:30 p.m. on a January day, not at the checkpoint, but at the intersection of New Mexico Highway 52 and Interstate 25. Highway 52 is a paved one-lane road on which the border patrol has sensors, because it is often used by smugglers of aliens and drugs to bypass the I-25 border checkpoint. Highway 52 is also apparently a primary access road to Elephant Butte Lake. When a sensor indicated that a vehicle was traveling on this road, the officer moved to a point where he could observe the vehicle at the intersection of Highway 52 and I-25. He saw a 1982 Ford Thunderbird with Oklahoma license plates appearing to ride low in the rear. After following the vehicle for approximately a mile, during which time he continued to observe that it appeared to ride low in the rear, the officer stopped the vehicle to make inquiries. These led to the consent of the driver to search the trunk, in which was a suitcase containing a substantial quantity of marijuana. Only the initial stop is at issue on this appeal.

We determine that a Terry stop was not permissible in the circumstances of the instant case. We cannot meaningfully distinguish this case from United States v. Monsisvais, ____ F.2d ____, No. 89-2187 (10th Cir. July 3, 1990). That decision

involved the stop of an apparently heavily loaded pickup with a camper shell and an Arizona license plate, at 7:30 p.m. at what appears to be the same intersection of Highways 85, 52 and I-25. Indeed, if anything the investigative stop in that case involved more suspicious actions by the vehicle driver and a less-traveled highway. There is no indication in the record that the automobile here with an Oklahoma license plate would be more likely to be involved in illegal activity than a pickup truck with an Arizona license.

Because we reverse on the Terry stop issue, we do not treat defendant's argument that a two-level reduction is required because he was a minor participant.

REVERSED.

Entered for the Court

James K. Logan
Circuit Judge